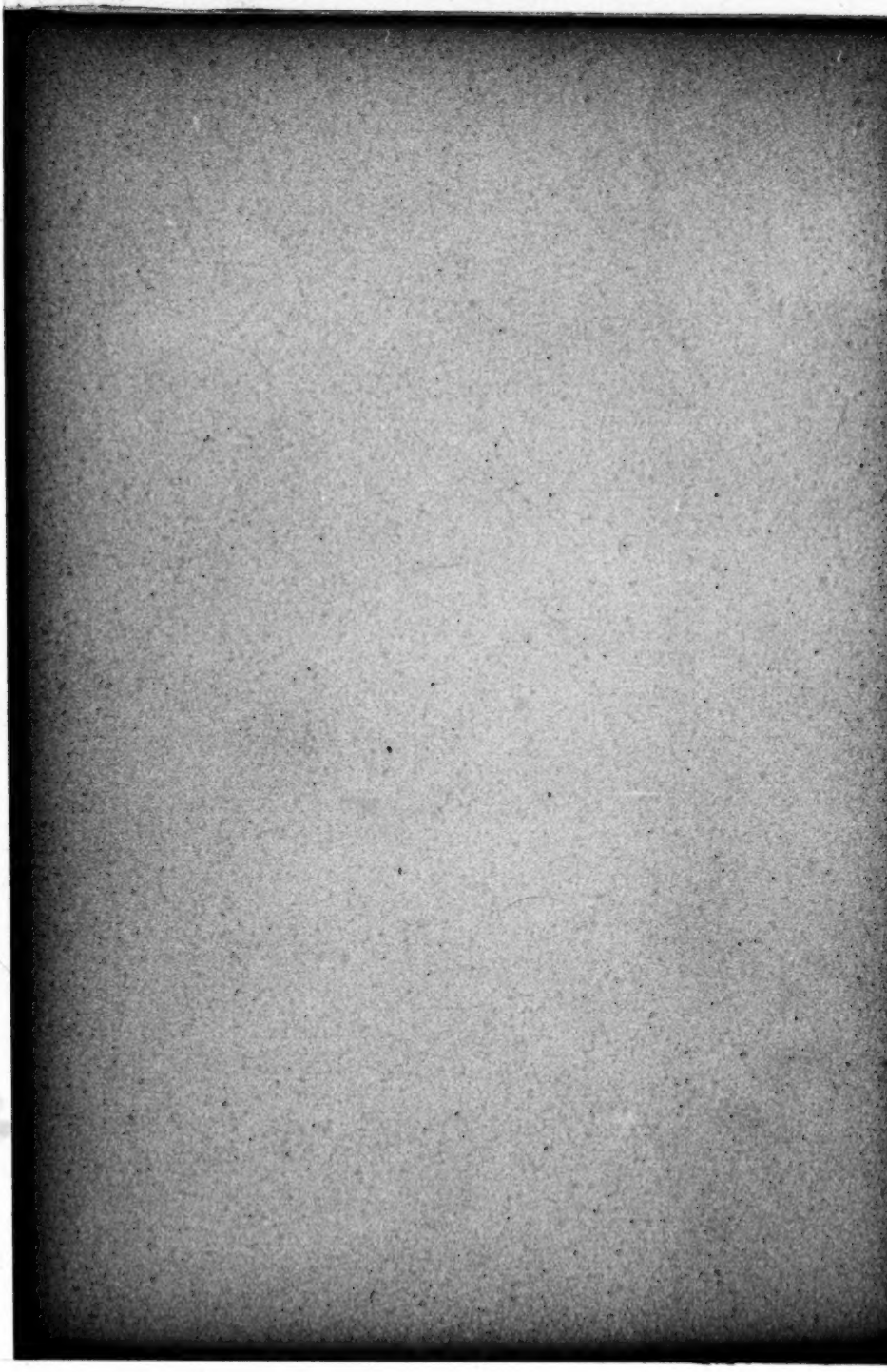

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-812
No. 72-6050

THOMAS TONE STORER, et al., *Appellants,*
vs.
EDMUND G. BROWN, JR., et al., *Appellees.*

GUS HALL, et al., *Appellants,*
vs.
EDMUND G. BROWN, JR., *Appellee.*

LAURENCE H. FROMMHAGEN, *Appellant,*
vs.
EDMUND G. BROWN, JR., *Appellee.*

On Appeal from the United States District Court for the Northern District of California

Brief of Appellee Edmund G. Brown, Jr.

EVELLE J. YOUNGER
Attorney General of the State of California

IVER E. SKJEIE
Assistant Attorney General

CLAYTON P. ROCHE
Deputy Attorney General
6000 State Building
San Francisco, California 94102
Telephone: 557-1586

Attorneys for Appellee Edmund G. Brown, Jr.

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Pages

Pages

CONSTITUTIONS

STATUTES

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-812
No. 72-6050

THOMAS TONE STORER, et al., *Appellants,*
vs.
EDMUND G. BROWN, JR., et al., *Appellees.*

GUS HALL, et al., *Appellants,*
vs.
EDMUND G. BROWN, JR., *Appellee.*

LAURENCE H. FROMMHAGEN, *Appellant,*
vs.
EDMUND G. BROWN, JR., *Appellee.*

On Appeal from the United States District Court for the Northern District of California

Brief of Appellee Edmund G. Brown, Jr.

OPINION BELOW

The Opinion and Order concurred in unanimously by the three judge federal court and which is applicable to the above entitled cases which this Court has consolidated is set forth at pages 84 to 91 of the Appendix.

QUESTIONS PRESENTED

1. Does California law, which in its totality provides alternative means for running for office and associating for the advancement of political beliefs, and which in no way freezes the political status quo, violate the fundamental rights of the appellants under the First and Fourteenth Amendments?

2. Assuming, *arguendo,* that the California Independent Nomination Procedure must be examined in a vacuum, do any of its substantive provisions violate the fundamental rights of the appellants?

3. Assuming, *arguendo,* that one or more of the substantive provisions of the California Independent Nomination Procedure are constitutionally objectionable, should these not be severed from this law, leaving the remaining substantive provisions operative?

4. Does California law, which permits an individual to run for Congress either as the nominee of any qualified political party to which he may belong or as a write-in candidate, add an additional qualification to the office of United States Representative merely because it restricts independent nominees to persons who did not vote at the primary election or who did not leave a qualified party within the year prior to the primary election?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The main constitutional and statutory provisions involved herein are:

1. United States Constitution, article I, section 4, clause 1 and article II, section 1, clause 2 granting states broad powers to regulate elections for Congress and choosing electors for President.

2. California Constitution, article II, section 4, as added November 7, 1972, requiring primary elections including an open presidential primary.

3. California Elections Code, section 6430 defining "qualified parties."

4. California Elections Code, sections 6800 through 6920, providing the Independent Nomination Procedure.

5. California Elections Code, section 48 providing for severability of invalid provisions.

6. California Elections Code, sections 6260 through 6263, 10229 and sections 18600 through 18604 providing for write-in votes. See also sections 10213, 10228, 10292 and 10317.

7. California Elections Code, sections 6401, 6402(a) and 6611 and specifically sections 6801, 6830(c) and 6830(d) of the Independent Nomination Procedure, *supra*, all relating to maintaining party integrity.[1]

STATEMENT OF THE CASE

In January 1972, appellant Storer and the American Civil Liberties Union decided to challenge California's Independent Nomination Procedure in order that Mr. Storer might have his name placed on the ballot as an independent candidate for Congress at the November 1972 general election. See Exhibit A to appellee's Points and Authorities filed August 18, 1972.

On May 30, 1972, appellant Storer and his supporters filed their action to attempt to invalidate all the substantive provisions of the Independent Nomination Procedure, claiming the *combined* effect of these provisions was to make it virtually impossible for Mr. Storer to attain ballot

1. Hereinafter, all section references will be to the California Elections Code unless otherwise indicated. Because of the bulk of code sections referred to in this brief, only key sections are included in the appendices herein.

status as an independent candidate for Congress at the November 1972 general election. Appendix, pp. 6, 11. Additionally, Mr. Storer challenged the Independent Nomination Procedure insofar as it restricts candidates to persons who did not vote at the preceding primary election, or who did not leave a qualified party within the 12 months preceding such primary election. The claim was that such constituted an additional qualification for Congress. Appendix, pp. 15-16. On August 8, 1972, Mr. Storer's action was served upon appellee along with his motion for a preliminary injunction attempting to gain ballot status with only 40 signatures instead of the 9,500, or the 5 percent required by law. Appendix, pp. 24, 85.

In the meantime, appellant Frommhagen and his supporters moved to intervene in the Storer action, which the court granted, making a similar claim as to the *combined* effect of the substantive provisions of the Independent Nomination Procedure and its effect upon candidates for Congress. They also sought ballot status for Mr. Frommhagen as an independent nominee for Congress in November 1972, with the benefit of only 40 signatures instead of 7,500, or the 5 percent required by law. Appendix, pp. 57, 60 (par. V), 62-65, 86. They similarly moved for a preliminary injunction to attempt to gain ballot status in November 1972, with only 40 signatures. Appendix, p. 69.

Neither in the Storer action nor the Frommhagen action was it seriously urged that the 5 percent signature requirement *by itself* was unconstitutional. Its constitutionality appears to have been conceded by Storer in oral argument. Rep.Tr. 8-9. As to Mr. Frommhagen, he advised the court in a supplemental brief that he "does not quarrel with the number of signatures to qualify an independent candidate." Appendix, p. 80. Despite this fact, there is no indication that either appellant attempted to collect the requisite num-

ber of signatures. As to signatures, the number 40 was selected because that is the number of sponsors a member of a qualified party must have to be a candidate for his party's nomination for Congress *at the primary election.* § 6495. A party candidate would, of course, have had to win at the primary election to have had ballot status in November 1972.

On August 18, 1972, appellee Secretary of State filed his opposition to granting of the requested preliminary injunctions, and his motion to dismiss on various grounds, including the ground that the complaints failed to state a claim upon which relief could be granted. Appendix, pp. 25-26.

Meanwhile, on August 11, 1972, appellants Hall and Tyner and their supporters filed another action also attacking the *combined* effect of the substantive provisions of the Independent Nomination Procedure upon their efforts to have Messrs. Hall and Tyner appear on the November 1972 general election ballot as "independent" nominees for President and Vice President, though they admittedly are members of the Communist Party, an unqualified party in California. Appendix, pp. 33, 34, 37 (pars. II, III, VIII). These candidate-plaintiffs whose party apparently could not meet the reasonable requirements of section 6430 to qualify for ballot status, also chose their own procedure. They sought ballot status on the "basis of percentage," (see § 6080), that is, the number of signatures which were required in 1972 to qualify a slate of delegates to appear on the Republican *primary election* ballot in 1972 to attend the national convention. This figure was alleged to be 18,000 instead of the 325,000 signatures, or the 5 percent required by law for an independent nomination. Appendix, pp. 37, 42. Hall and Tyner also moved for a preliminary injunction. Appendix, p. 46.

On August 25, 1972, appellee Secretary of State filed his opposition to the granting of a preliminary injunction, and his motion to dismiss the *Hall* case on numerous grounds, including the ground that the complaint failed to state a claim upon which relief could be granted. Appendix, p. 51.

On August 31, 1972, oral argument was heard by the three judge federal court in the *Storer* and *Frommhagen* case. The reporter's transcript is part of the record herein.

Since both cases, *Storer* and *Hall* were assigned to the same three judge court, counsel stipulated that *Hall* would be submitted on the briefs and the argument in *Storer*.[2]

On September 8, 1972, the three judge federal court issued its Opinion and Order holding California's Independent Nomination Procedure valid essentially on the grounds that there are sufficient alternative means of access to the ballot in California so as to satisfy the First and Fourteenth Amendment rights of the plaintiffs. Appendix, p. 84 *et seq.* Appellants Storer and Hall appealed on September 13, 1972.

On September 15, 1972, Justice Douglas denied a stay, after hearing oral argument in Goose Prairie, Washington.

On October 10, 1972, Mr. Frommhagen filed his separate appeal.

On March 5, 1973, this Court noted probable jurisdiction and consolidated the cases for purposes of this appeal.

By letter dated March 30, 1973, the Committee for Democratic Election Laws requested that we agree to their filing an amicus curiae brief attacking solely the 5 percent signature requirement of the Independent Nomination Procedure. We declined primarily on the basis that such would interject a new issue into this case, as discussed above. The

2. Thus in *Hall* there was also no serious contention that the 5 percent signature requirement, standing alone, is unconstitutional.

Committee thereafter apparently moved the Court to file such a brief, which motion was granted on May 7, 1973. Appellee Brown did not receive a copy of the motion before said date, nor has he yet received a copy.

This brief is filed as a single response to the briefs in the *Storer* and *Hall* cases, the brief in the *Frommhagen* case, and the brief filed by the Committee for Democratic Election Laws.

SUMMARY OF ARGUMENT

In *Williams v. Rhodes,* 393 U.S. 23 (1968), this Court struck down Ohio's election laws on the grounds that Ohio made it virtually impossible for any party other than the Republican or Democratic Parties to participate in the presidential election in 1968. A third party could not qualify for ballot space in Ohio because of the stringent requirements of its laws.

In *Jenness v. Forston,* 403 U.S. 431 (1971), this Court upheld the 5 percent signature requirement for a "political body" or independent to gain access to the ballot in Georgia. In so doing, the Court pointed out that Ohio's laws were held unconstitutional in *Williams v. Rhodes, supra,* 393 U.S. 23 (1968), because Ohio's laws, *taken in their totality,* froze the political status quo. In upholding Georgia's 5 percent signature requirement the Court did so on the basis that Georgia's laws, unlike Ohio's, did not freeze the status quo, but recognized the fluidity of political life.

Likewise, California's election laws, in their totality, recognize the fluidity of political life and in no way freeze the political status quo. California provides many alternative means for parties and individuals to participate in its electoral process. Parties may qualify for ballot space pursuant to section 6430 under three alternatives. Independents, or persons not members of qualified parties, may utilize the

Independent Nomination Procedure. Write-in candidacy is also provided for in both the primary and general elections. In fact, in 1968 two new parties qualified for ballot positions under the lenient 1 percent registration requirements of section 6430, subdivision (c). These were the Peace and Freedom Party and the American Independent Party. Also in November 1972, an individual qualified for and ran for State Assembly as an independent candidate.

In tailoring its election laws, States may recognize as legitimate and compelling state interests such factors as (1) a manageable ballot (2) a significant modicum of support for parties or candidates (3) protection of the party system (not two particular parties) and (4) that the winning candidate reflects the will of the majority, or at least a strong plurality, of its citizens.

California's election laws reflect a reasoned intermeshing of provisions to further these legitimate and compelling state interests while at the same time insuring the fluidity of political life. There is no federal constitutional right to an Independent Nomination Procedure. Nor should such procedure be examined in a vacuum in determining the validity of California election laws. In partisan races, the Independent Nomination Procedure provides candidates for the general election *after* political parties have nominated candidates at partisan primaries for partisan offices. It is indeed a legislative bonus. Individuals already have had an opportunity to freely associate and form new parties under section 6430. Their constitutional rights are protected by such section. They could be "independents" who might designate themselves as the "Disaffected Party" or some such appellation to show their dissatisfaction with the present political parties. Therefore, the Independent Nomination Procedure supplies *an additional alternative for the disaffected.*

As to candidates themselves, there is no constitutional right to have one's name printed on the ballot. For individuals who do not elect to associate for the formation of new parties, or who are unable to garner the necessary support for ballot status as an independent, the write-in process satisfies their rights to participate in the electoral processes.

However, assuming, *arguendo*, that the Independent Nomination Procedure must be examined in a vacuum, contrary to the Court's approach in *Jenness v. Forston, supra*, 403 U.S. 431 (1971), its provisions further legitimate and compelling state interests. The 5 percent signature requirement of section 6831 insures the significant modicum of support to prevent proliferation of the ballot. Section 6830(c), insofar as it prohibits persons who voted at the preceding primary from signing independent nomination petitions is a recognized, valid provision, which promotes party integrity, and prevents party splintering. Likewise, section 6830(c), insofar as it prohibits persons who voted at the preceding primary from being independent candidates, as well as section 6830(d) which prevents an individual who has defected from a qualified party within 12 months of the primary election from being an independent nominee, also promote the compelling state interest of party integrity and preservation of the party system. These provisions are really part and parcel of a series of sections found in *both* the primary laws and the Independent Nomination Procedure furthering such proper state interest and goal.

The 24-day requirement for the collection of signatures insures that signatures are collected at about the time party platforms are adopted in California. It also promotes the interest of the state in seeing that petitions reflect the current attitude of voters, while also permitting time to prepare for the election.

As to the claim that section 6830, subdivisions (c) and (d) place additional qualifications for Congress, such is in error. Even assuming that such section prohibits a person from being a candidate who voted a *nonpartisan* ballot at the primary, such section does not constitute an absolute bar to candidacy. Nor does the fact that the individual concerned may have defected from a recognized political party constitute an absolute bar. The individual may still be a write-in candidate. These prohibitions are, therefore, regulations, not qualifications for office.

In that section 6430 already protects the rights of individuals and potential candidates to associate and form new political groups (even should they be the disaffected), and, therefore, the Independent Nomination Procedure is a truly legislative bonus, such procedure's impact on the voters is not sufficiently great as to require application of the "close scrutiny test," but should be sustained on the rational basis test. See *Bullock v. Carter*, 405 U.S. 134, 142-43 (1971). However, the procedure also meets the close scrutiny test.

If, however, the Court should find that any of the numerous substantive provisions of the Independent Nomination Procedure are invalid, then, under the legislative direction of section 48, these should be severed, leaving the remaining portions intact.

As to the brief of the Committee for Democratic Election Laws, such raises new issues not raised below, is inaccurate, and we submit, is an improper attempt to try factual matters before this Court for the Socialist Workers Party which were not submitted to the lower court.

ARGUMENT

I. California's Election Laws Do Not Freeze the Political Status Quo, But Recognize the Fluidity of American Political Life

Apparently to some, the case of *Williams v. Rhodes, supra,* 393 U.S. 23 (1968), appeared to be the "open sesame" for the invalidation of state electoral systems. For example, in *Jenness v. Forston,* 403 U.S. 431 (1971), the Court was faced with an attack on Georgia's electoral system by the Socialist Workers Party based upon the decision in *Williams v. Rhodes.* If construed too broadly, such decision might lead one to believe that any party or group, no matter how small, has a constitutional right to have its candidates' names printed on the ballot.

The Court, however, in *Jenness v. Forston, supra,* 403 U.S. 431 (1971), dispelled such overly broad possible implication of its 1968 decision pointing out that:

> "In the *Williams* case the court was confronted with a state electoral structure that favored 'two particular parties—the Republicans and the Democrats—and in effect tend[ed] to give them a complete monopoly'...." *Id.* at 434.

The Court in *Jenness v. Forston* further pointed out that in *Williams v. Rhodes*:

> "In a separate opinion Mr. Justice Douglas described the then structure of Ohio's network of election laws in accurate detail:
>
> 'Ohio, through an entangling web of election laws, has effectively foreclosed its presidential ballot to all but Republicans and Democrats. It has done so initially by abolishing write-in votes so as to restrict candidacy to names on the ballot; it has eliminated all independent candidates through a requirement that nominees enjoy the endorsement of a political party; it has defined "political party" in such a way

> as to exclude virtually all but the two major parties.' ..." *Id.* at 436.

Thus in *Jenness v. Forston,* this Court upheld Georgia's 5 percent signature requirement as to a "political body" or independent's ability to gain access to the ballot at the general election *vis-a'-vis* the primary election nominee of a political party. The Court, after examining the *totality* of Georgia's laws in comparison with Ohio's, stated that:

> ". . . *Georgia's election laws, unlike Ohio's, do not operate to freeze the political status quo.* In this setting we cannot say that Georgia's 5% petition requirement violates the Constitution." *Id* at 438. (Emphasis added.)

Additionally, this Court held that:

> "In a word, Georgia in no way freezes the status quo, but implicitly recognizes the fluidity of American political life. . . ." *Id* at 439.

See also *Raza Unida Party v. Bullock,* 349 F.Supp. 1272, 1279 (W.D.Tex. 1972, three-judge court), prob. jur. noted, *sub nom., American Party of Texas v. Bullock,* 3/5/73, where the court stated:

> ". . . Following the *Jenness* command to look to the *'totality'* of a state's requirements, and balancing Texas' burdensome organization requirements against its lenient 1% petition requirement, we hold that the organization requirements are constitutionally permissible." (Emphasis added.)

See also *Baird v. Davoren,* 346 F.Supp. 515, 519 (D.Mass. 1972, three-judge court), employing the "totality" approach.

This is exactly what the lower court did in the instant cases. It looked at California's laws in their totality. See Appendix, p. 88.

In California "qualified parties," that is, parties qualified to participate in primary elections, are provided for in section 6430.

Pursuant to section 6430 a party may attain the status of a qualified party in California if: (1) it polled at least 2 percent of the vote at the last gubernatorial election as to any statewide candidate, subdivision (a); or (2) if on the 135th day before the primary election it had registered with its party voters equal to 1 percent of the vote cast at the last gubernatorial election, subdivision (c); or (3) if on the 135th day before the primary election, it has filed a petition signed by voters equal in number to 10 percent of the votes cast at the last gubernatorial election, subdivision (d). (Subdivision (b) apparently was enacted to provide percentage requirements when cross-filing was permitted in California.) See *Christian Nationalist Party v. Jordan*, 49 Cal.2d 448; 318 P.2d 473 (1957), and *Socialist Party, U.S.A. v. Jordan*, 49 Cal.2d 864; 318 P.2d 479 (1957), *cert. denied*, 356 U.S. 952 (1957), upholding the constitutionality of the predecessor to section 6430.

Section 6430 has insured the fluidity of political life in California in the past and in recent years. In fact, in 1968, both the American Independent Party and the Peace and Freedom Party qualified for a place on the California ballot under the provisions of subdivision (c). Each had over 100,000 registered party members when they qualified. See Exhibit G to appellee's Points and Authorities filed August 18, 1972. These two minor parties were on the California ballot in 1972. Additionally, in past years California has also had such "third parties" on the ballot as the Prohibition Party, and the Independent-Progressive Party.[3] The Democratic and Republican Parties thus have no monopoly on political life in California, nor have they

3. See, *e.g.*, "State of California, Statement of Vote, General Election, November 4, 1952" compiled by Frank M. Jordan, Secretary of State, pp. 4-7. Though not a part of the record, this is subject to judicial notice.

had in the past. There is no freezing of the status quo in California. Obviously, under the literal terms of the liberal subdivision (c), *supra,* there could be 100 parties qualified for the ballot in California.

Additionally, California has a write-in procedure applicable to both primary and general elections. §§ 10213, 10228, 10292, 10317. To avoid the necessity for counting votes for persons written in in jest, the 1968 Legislature enacted sections 18600 through 18604 to provide that if a person desires to be a write-in candidate, he file a declaration to that effect and pay the filing fee. California also has write-in procedures for the presidential primary, sections 6260-6263, and presidential electors, section 10229.

Thus, the fluidity of political life in California is guaranteed by section 6430, *supra,* permitting new groups or parties to qualify for the ballot with a modicum of support, and also by providing the write-in process. As a *bonus,* the Legislature has also provided the Independent Nomination Procedure, which appellants solely attack here, to insure greater fluidity and to further insure that the status quo is not frozen.

II. States May in Their Election Laws Provide for (1) a Manageable Ballot (2) Party and Candidate Support (3) Protection of the Party System and (4) Electoral Support for the Winning Candidate

A. GUARDING AGAINST PROLIFERATION OF THE BALLOT IS A COMPELLING STATE INTEREST

> "The Court has recognized that a State has a legitimate interest in regulating the number of candidates on the ballot. *Jenness v. Forsten,* 403 U.S. at 442; *Williams v. Rhodes,* 393 U.S., at 32 . . ." *Bullock v. Carter, supra,* 405 U.S. 134, 145 (1972).

This "legitimate interest" has been held to be a "compelling state interest." *Baird v. Davoren, supra,* 346 F.Supp.

515, 519, 521 (D.Mass 1972, three-judge court); *Bendinger v. Ogilvie,* 335 F.Supp. 572, 575 (N.D.Ill. 1971, three-judge court). Thus, attempts by appellants herein to try to degrade such interest by describing it in terms of a "talismanic incantation" are not justified. See appellants' brief, *Storer,* p. 23.

B. REQUIRING PARTY AND CANDIDATE SUPPORT IS A COMPELLING STATE INTEREST

Whether considered as a separate interest of the state, or whether considered as a facet of insuring a manageable ballot, there is no doubt that the state has an important interest in insuring party or candidate support. As stated in *Jenness v. Forston, supra,* 403 U.S. 431, 442 (1970):

> "There is surely an important state interest in requiring some preliminary showing of a *significant* modicum of support before printing the name of a political organization's candidate on the ballot—the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election. . . ." (Emphasis added.)

Such substantial modicum of support is also recognized as a compelling state interest. *Jackson v. Ogilvie,* 325 F.Supp. 864, 868 (N.D.Ill. 1971, three-judge court), *aff'd mem,* 403 U.S. 925 (1971). See also, *e.g., Beller v. Kirk,* 328 F.Supp. 485 (S.D.Fla. 1970, three-judge court), *aff'd sub nom., Beller v. Askew,* 403 U.S. 925 (1971).

C. PROTECTION OF THE PARTY SYSTEM IS A COMPELLING STATE INTEREST

Though the disaffected would probably not agree, there also is no doubt that protection of our party system, and the protection of the integrity of parties, is a legitimate and compelling state interest.

In holding a "24-month rule" constitutional as to party candidates, the court in *Bendinger v. Ogilvie, supra,* 335 F.Supp. 572 (N.D.Ill 1971, three-judge court) set forth perhaps the finest exposition of the party integrity concept, and the compelling state interest in the protection of the party system, and noted that "The keystone of our democracy is the party system of politics" and that "Without rules like the '24 month rule,' party swapping and changing might conceivably become so prevalent that the average political party could no longer function properly." *Id.* at 575. See also, *Tansley v. Grasso,* 315 F.Supp. 513, 517 (D. Conn. 1970).

Or as succinctly stated by the Supreme Court of Florida in *Crowells v. Petersen,* 118 So.2d 539-40 (Fla. 1960):

> "... The requirement of two years registration within the party as a condition precedent to become a candidate of that party is, in our judgment, a reasonable regulation. It contributes directly to the maintenance of party loyalty and a perpetuation of the party system which the courts have universally held to be essential to the preservation and perpetuation of our political life."

In fact, this Court itself has recognized both by summary affirmance and otherwise the compelling state interest in protection of the party system and the integrity of parties. In *Lippitt v. Cipollone,* 337 F.Supp. 1405, 1406 (N.D. Ohio 1971, three-judge court), *aff'd mem,* 404 U.S. 1032 (1972), the court, in upholding Ohio's law against party raiding held:

> "The compelling State interest the Ohio Legislature seeks to protect by its contested statutes is the integrity of all political parties and memberships herein...."

See also *Williams v. Rhodes, supra,* 393 U.S. 23, 31-32 (1968), implicitly recognizing the importance of the party

system so long as two parties do not retain a permanent monopoly. Two parties, of course, have no monopoly in California.

D. INSURING ELECTORAL SUPPORT FOR THE WINNING CANDIDATE IS A COMPELLING STATE INTEREST

Finally, with regard to compelling state interests in general, a state also has a legitimate and compelling interest in attempting to insure that the winning candidate is the choice of a majority, or at least a large plurality, of the electorate. This interest might also be considered a facet of the interest in prevention of ballot proliferation. *Bullock v. Carter, supra,* 405 U.S. 134, 145 (1971); *Williams v. Rhodes, supra,* 393 U.S. 23, 32 (1968).

III. The Traditional Rational Basis Test Should Be Applied in Determining the Constitutionality of California's Independent Nomination Procedure

As has been explained above, the Independent Nomination Procedure is truly a legislative bonus. As far as both voters and candidates are concerned, if they do not wish to associate with the two major parties in California, or third parties which may be also currently qualified, section 6430 already permits them to freely "... associate, to proselytize, to speak, to write, and to organize campaigns for any school of thought they wish ... [or] [t]hey may confine themselves to an appeal for write-in votes. . . ." *Jenness v. Forston, supra,* 403 U.S. 431, 438 (1971). Thus, even without the Independent Nomination Procedure, reasonable alternatives to the ballot are provided for groups and candidates with a significant modicum of support. Also the write-in process is available for candidates not desiring to partake in the forming of or joining new associational groups, or who have little or merely local backing.

There is no federal constitutional right to run for office as an independent. See *Jones v. Hare,* 440 F.2d 685 (C.A.6 1971), *cert. denied,* 404 U.S. 911 (1971), holding a claim to such right as so unsubstantial as not to need further argument.[4] In view of this fact, and the fact that the fluidity of political life in California is assured even without independent nominations, the lack of the Independent Nomination Procedure would have, or its existence has, little impact on the voters. Therefore, under the Court's reasoning in *Bullock v. Carter, supra,* 405 U.S. 134, 142-43 (1972), the rational basis test would be applicable to California's Independent Nomination Procedure, instead of the more rigid close scrutiny test. As the Court reasoned in *Bullock v. Carter:*

> "The initial and direct impact of filing fees is felt by aspirants for office, rather than voters, and the Court has not heretofore attached such fundamental status to candidacy as to invoke a rigorous standard of review. However, the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters. Of course, not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review. *McDonald v. Board of Election,* 394 U.S. 802 (1969). Texas does not place a condition on the exercise of the right to vote, nor does it quantitatively dilute votes that have been cast. Rather the Texas system creates barriers to candidate access to the primary ballot, thereby tending to limit the field of candidates from which voters might choose.

4. We note that *In re Terry,* 203 N.Y. 293, 96 N.E.931 (1911) and *Moore v. Walsh,* 286 N.Y. 552, 37 N.E.2d 555 (1941), cited at page 24 of appellants' brief for another point, hold there is a right in New York to be an independent nominee. These cases, however, are clearly based upon the New York Constitution.

> The existence of such barriers do not of itself compel close scrutiny. Compare *Jenness v. Forston,* 403 U.S. 431 (1971), with *Williams v. Rhodes,* 393 U.S. 23 (1968). In approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters." (Footnotes omitted.)

Cf. Rosario v. Rockefeller, ... U.S. ..... (1973), 41 L.W. 4401, March 21, 1973.

Since the disaffected may organize and associate pursuant to section 6430, and form new "parties"[5] to advance their ideas, the impact of the Independent Nomination Procedure falls lightly upon the voters, and the rational basis test should apply when examining California's Independent Nomination Procedure.

IV. Assuming, Arguendo, That the Independent Nomination Procedure Must Be Examined in a Vacuum, it Is Valid Whether the Rational Basis Test or the Close Scrutiny Test Is Applied.

Assuming, *arguendo,* that California's Independent Nomination Procedure must be examined in a vacuum, contrary to the Court's "totality" approach in *Jenness v. Forston, supra,* 403 U.S. 431 (1971), it is valid whether the rational basis test or the close scrutiny test is applied. Each of its provisions are not only reasonably related to the achievement of legitimate state purposes, but are necessary to further compelling state interests.

---

5. Arguments that appellants want to have nothing to do with "political parties," and therefore should not be required to utilize section 6430, because they are "independents" are illusory. Independent of what? The major parties? Thought? Action? Do they exist in a vacuum so they can have no common grounds, thoughts or ideas for associational purposes? Logic commands that so long as voters may associate for common purposes, a state may require they be denominated a "party," even if they should want to call themselves "The Independent of Everything Party."

A. THE 5 PERCENT SIGNATURE REQUIREMENT IS VALID AS ARE OTHER SUBSTANTIAL SIGNATURE REQUIREMENTS

As pointed out in section II, B, *supra*, the requiring of substantial support for parties and candidates before they may be *printed* on the ballot promotes compelling state interests.

Section 6831 states that "Nomination papers shall be signed by voters of the area for which the candidate is to be nominated, not less in number than 5 percent . . . of the entire vote cast in the area at the preceding general election. . . ."

This Court upheld the 5 percent signature requirement for independent nominees in Georgia in *Jenness v. Forston, supra*, 403 U.S. 431 (1971). *Jackson v. Ogilvie, supra*, 325 F. Supp. 864 (N.D.Ill. 1971, three-judge court), *aff'd mem*, 403 U.S. 925 (1971), also upheld such a 5 percent requirement. Other courts have upheld substantial signature requirements for independents or new parties. See, *e.g., Baird v. Davoren, supra*, 346 F.Supp. 515 (D.Mass. 1972, three-judge court), 3 percent requirement; *Beller v. Kirk, supra*, 328 F.Supp. 485 (S.D.Fla. 1970, three-judge court), *aff'd sub nom, Beller v. Askew*, 403 U.S. 925 (1971), 3 percent requirement; *People's Constitutional Party v. Evans*, 491 P.2d 520 (N.M. 1971), 3 percent requirement; *Beller v. Adams*, 235 So.2d 502 (Fla.1970), 5 percent requirement.

> "There is surely an important state interest in requiring some preliminary showing of a *significant* modicum of support before printing the name of a political organization's candidate on the ballot—the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election. . . ." (Emphasis added.)

Jenness v. Forston, supra, 403 U.S. 431, 442, (1971), *re* the 5 percent requirement as to minor parties and independent candidates.

Despite these holdings, appellants asked for ballot position at the general election without the requisite *significant* modicum of support. Messrs. Storer and Frommhagen requested they have their names printed on the ballot with only 40 signatures. Messrs. Hall's and Tyner's position was analogous on the statewide level. Their requests border upon the ludicrous. See §§ 6080, 6082 and 6495.

The argument advanced by appellants that California's 5 percent requirement is in reality a 25 percent requirement is both illusory and, we feel, incorrect. It is premised upon two things: (1) That 70 percent of the electorate are removed from the pool of electors who may sign petitions because (2) persons who voted either a partisan or nonpartisan ballot at the primary election may not sign such petitions.

The argument is illusory for the simple reason that a vast portion of the electorate is already automatically removed from the pool of individuals who would sign independent nomination petitions by reason of party affiliation or loyalty. Therefore, in any state it could be argued that a 3 percent requirement is in reality a 15 percent requirement, or that a 5 percent requirement is in reality a 25 percent requirement. In short, the significant modicum of support will almost always be found in a "residual group."

Secondly, the argument is incorrect in that it presupposes the obvious erroneous position that 70 percent of the electorate who are registered for the general election (1) were also registered for the primary election [they need not have been] and (2) they also voted at the primary election. In 1972 there was a statewide increase in registration between the primary and general elections of 1,360,928

voters which added to the potential pool of signatories for independent nominees.[6]

In fact, we demonstrated below in *Storer* and *Frommhagen* (and assuming the nonpartisan who voted at the primary election may sign[7]) that the potential pool of signatories in the congressional districts involved herein was closer to 50 percent of the electorate than the 30 percent claimed by appellants. See appellee's Points and Authorities filed August 18, 1972, pp. 16-17 and Exhibits D, E and F thereto.[8]

B. SECTION 6830(c), INSOFAR AS IT REQUIRES SIGNATORIES WHO DID NOT VOTE AT A PRECEDING PRIMARY, IS VALID

Section 6830(c) requires that independent nomination papers contain ". . . [a] statement that . . . each signer . . . did not vote at the immediately preceding primary election at which a candidate was nominated for the office. . . ."

This type of restriction has been upheld numerous times by courts in recent years, and even summarily affirmed by this Court or dismissed for want of a substantial federal question.

In *Moskowitz v. Power, et al.*, 25 N.Y. 2d 933, 305 N.Y. Supp.2d 150 (1969), appeal dismissed, 396 U.S. 373 (1970):

---

6. Reports of Registration, State of California, May 1972 and October 1972, pp. 111 and 106 respectively. These are not part of the record but are subject to judicial notice.

7. This point will be developed further *infra*, and may affect one of the assumptions appellants use to predicate their "70% removal" argument, that is, that persons who voted nonpartisan ballots at the primary election may not sign independent nomination petitions.

8. We note that in *People ex rel Hotchkiss v. Smith*, 206 N.Y. 231, 99 N.E. 568 (1912), cited by appellants for another point, the court invalidated the signature requirements of the then New York independent nomination law. However, it reinstated prior *valid* law, which in Hamlin County could have still required one-third of the voters to sign a petition.

"The nominating petition required a minimum of 5,000 signatures. It contained 6,534 signatures. The Board of Elections however invalidated 3,043 signatures. Of those invalidated 1,392 were those of persons who had voted in the 1969 primary election and 1,393 were those of persons who had not registered.

"Moskowitz contended that the requirement of Election Law § 138, subd. 5, par. (c) that nominating petition for the office have 5,000 signatures when only 2,500 signatures were required on a designating petition by Election Law § 136, subd. 2, par. (c) was unconstitutional because discriminatory, and that statutory provision that name of person signing an independent nominating petition shall not be counted if that person voted at the primary election, Election Law, § 138, subd. 6, was an unconstitutional invasion of right to vote." 305 N.Y.Supp.2d at 150.

The New York Court of Appeals affirmed the decision of the lower court denying Moskowitz candidate status. See 33 App.Div.2d 562, 305 N.Y.Supp.2d 762 (1969). This Court dismissed for want of a substantial federal question.

In *Socialist Workers Party v. Rockefeller,* 314 F.Supp. 984 (S.D. N.Y. 1970, three-judge court), *aff'd mem.,* 400 U.S. 806 (1970), against an attack by minor parties on New York election laws similar to the attack herein, the court upheld the validity of the New York provision against voting both at the primary and *thereafter* signing an independent nomination petition, reasoning in part:

"On the other hand, that portion of Section 138 which discounts the signature of a voter who has voted at a primary election where a candidate was nominated for an office for which the nominating petition purports to nominate another candidate, can be justified by the compelling State interest to preserve inviolate the sanctity and secrecy of the ballot. Since the State cannot determine which candidate a particular voter

> selects in the primary or whether he has in fact selected only some of the proffered candidates, this provision can be justified under the present teachings of the Supreme Court. . . ." *Id.* at 993.

In *Jackson v. Ogilvie, supra,* 325 F.Supp. 864 (N.D. Ill. 1971, three-judge court), *aff'd mem.,* 403 U.S. 925 (1971), the court stated as to restrictions as to signatories:

> "Plaintiff Jackson also challenges § 10-4 of the Illinois Election Code on the ground that this provision restricts the availability of potential signatories. As we noted above § 10-4 does not prevent any qualified signatories from signing a nominating petition for Jackson. The statutory scheme of the State of Illinois establishes and secures by statute the mandate of Baker v. Carr, *supra,* and its progeny. *Baker* requires that one elector must have one vote. Under the Illinois Election Code an elector is offered an option. He may sign a petition for an independent candidate. If he signs such a petition he is not qualified to vote in a primary election for a candidate seeking the same office as the independent who he supports. 46 Ill.Rev. Stat. § 7-43(c). Further, were it possible for a primary election to occur prior to the date for filing nominating petitions, then voting in a primary would prevent an elector from supporting an independent. Thus, the state's scheme attempts to insure that each qualified elector may in fact exercise the political franchise. He may exercise it either by vote or by signing a nominating petition. He cannot have it both ways. Such a requirement seems not only fair but mandatory under the holding in Baker v. Carr, *supra.*" *Id.* at 867.

Finally, in *Stout v. Black,* 8 Ill.App.3d 167, 289 N.E.2d 456 (1972), the court sustained the constitutionality of the law requiring rejection of signatories on a *congressional* independent nominee's petition who had already voted at

the congressional primary on the authority of *Jackson v. Ogilvie,* reasoning:

> ". . . we do think it a constitutional means of protecting the integrity of the election process. As noted in *Jackson,* the Illinois Election Code offers the elector an option. In addition to the Section 10-4 restriction on signing nominating petitions after voting in a primary, Section 7-43(c) provides that one signing the petition of an independent cannot later vote in a primary at which candidates for the same office are being selected. This provision has been held constitutional on the basis that the nominating process in Illinois would be endangered by allowing non-party members to participate in a party primary. Rouse v. Thompson (1907), 228 Ill. 522, 547-548, 81 N.E. 1109. This reasoning is equally applicable here. The danger of a non-party member attempting to subvert the party's best candidate while at the same time putting his desired candidate on the ballot exists regardless of whether the primary comes before or after the signing of the petition. *Allowing a person to take part in nominating two people for the same office in the same election can only lead to fraud and the destruction of party organization.* See Katz v. Fitzgerald (1907), 152 Cal. 433, 93 P. 112.
>
> "The fact that Section 10-4 has the effect of disallowing signatures of some people who did not actually vote for a candidate for the particular office in the primary, or whose candidate did not win the nomination, does not render the statute unconstitutional. *Since a primary is conducted by closed ballot, no statute could be drawn more narrowly.*" (Emphasis added.) 289 N.E.2d at 456.

Thus, there is no doubt that provisions such as 6830(c) are valid. This being so, appellants' claim that such a provision is unconstitutional in that it requires a person to

give up one right, the right to vote, in order to exercise another fundamental right is completely without merit. As noted by the court in *Socialist Workers Party v. Rockefeller, supra,* 314 F.Supp. 984, 993 (S.D.N.Y.1970, three-judge court), *aff'd mem,* 400 U.S. 806 (1970) ". . . [t]he purpose . . . is to limit each voter to but a single choice for office. . . ."

The fact that there is no doubt that a restriction as to signatories such as 6430(c) is valid nullifies other contentions raised by appellants. Obviously, *Jackson v. Ogilvie* did not, as appellants claim, consider it necessary to construe the independent nomination procedure so as to avoid the possibility that independent nomination papers could only be circulated after a primary election. A careful reading of *Jackson v. Ogilvie* will demonstrate that the construction avoided was the inability to sign a petition for having voted at a *completely different* prior mayoralty race. See 325 F.Supp. at 866-67. *Moore v. Board of Elections For District of Columbia,* 319 F.Supp. 437 (D.D.C.1970), is inapposite in this regard in that it construed the law of the District of Columbia to permit an individual to *sign* both a primary nominating petition, and an independent nominating petition. It construed laws not even similar to section 6430(c). Appellants Storer and Hall were prejudiced very little because they did not have access to the 40 voters who at the primary election sponsored each of their would-be opponents.

Finally, with regard to appellants' contentions, the cases sustaining statutes such as 6830(c) also implicitly recognize that where the primary precedes the circulation of an independent nomination petition, a certain number of the voters will necessarily be removed from the potential pool of signatories. (See IV, A, *supra.*)

It is to be noted that the court below apparently construed section 6830(c) so as not to make a distinction between persons who voted a nonpartisan ballot and those who voted a partisan ballot at the primary election. Appendix, p. 86. If, however, this Court should feel that such a literal interpretation of section 6830(c) was improper, we point out and renew the argument we made below that the disqualification as to signing a petition is not applicable to independents, or members of unqualified parties who voted only a nonpartisan office ballot and on measures.[9] See appellee's Points and Authorities filed August 18, 1972, pp. 10, 13.

It was appellee Secretary of State's position below that section 6830(c) means that that signers of an independent nomination petition cannot have voted a partisan primary ballot. In California, each qualified party has a separate ballot. There is also a nonpartisan ballot. § 10290 *et seq.*, § 14406. Essentially, there is a primary election for each qualified party (in 1972, the Democrats, Republicans, American Independent Party Members and Peace and Freedom Party Members), and the nonpartisans (or "declines to state" as the plaintiffs) hold a nonpartisan primary.

> ". . . What we call 'the primary election' is really a number of primary elections equal to the number of parties participating, but conducted at the same time and at the same polling-places by one set of public officers. . . ." See *Schostag v. Cator,* 151 Cal. 600, 603-04, 91 Pac. 502, 503 (1907).

Therefore, it was the Secretary of State's position that if voters did not vote at a "partisan primary," but only the

---

9. This reasoning would equally apply to the court's construction of section 6830(c) as to disqualification for independent candidacy for having voted on nonpartisan matters at the June 1972 primary election, to be discussed *infra*.

nonpartisan ballot, they were not excluded from signing an independent nomination petition.

C. INSOFAR AS SECTION 6830(c) MAY HAVE PREVENTED APPELLANTS FROM BEING CANDIDATES, SUCH WAS PROPER TO INSURE PARTY INTEGRITY. THE SAME PRINCIPLES ARE APPLICABLE TO SECTION 6830(d)

As pointed out initially, California's election laws present a reasoned intermeshing of primary and general election laws. Section 6830(c),[10] insofar as it prevents candidates for independent nomination, as well as their signatories, from having voted in the primary election, is part and parcel of a group of statutes which insure party integrity and thus the preservation of our party system. It must be read in context as a part of the entire group of such statutes. The same reasoning applies to section 6830(d).

Section 6401 of the primary law requires a party nominee to have been affiliated with his party for three months prior to filing his nomination papers, and with no other *qualified party* for one year. The corollary provision is section 6830(d) requiring that an independent nominee also not have been registered with a qualified party for one year immediately preceding the primary election.

Section 6402(a) of the primary law, and section 6801 of the Independent Nomination Procedure both prohibit a candidate who was defeated in a partisan primary from being an independent candidate.

Section 6611 of the primary law prohibits a candidate who fails to receive his own party's nomination from being the candidate of any other political party.

And as already discussed in the previous section, section 6430(c) prevents persons who have voted in a primary from

---

10. See note 9, *supra* re the position of the Secretary of State below as to the interpretation of this section as to independents who vote a nonpartisan primary ballot.

being signatories for independent candidates at the general election.

These sections in their totality achieve not only the compelling State interest against "party hopping" but also prevent "party splintering," an obvious compelling interest of the State. In short, in their totality, these sections serve the compelling State interests of insuring that the party system does not disintegrate.

These sections also comport with California Constitutional provisions and federal law. Article II, section 4 of the California Constitution, as added in November 1972, provides that "The Legislature shall provide for primary elections for partisan offices. . . ."[11] States, of course, ". . . have broad discretion in formulating election policies. . . ." *Tansley v. Grasso, supra,* 315 F.Supp.513, 519 (D.Conn. 1969, three-judge court), citing *inter alia, Williams v. Rhodes, supra,* 393 U.S. 23, 34 (1968) and *United States v. Classic,* 313 U.S. 299, 311 (1941). Protection of the party system and party integrity are compelling state interests, as demonstrated in II, C, *supra.*

In fact, section 6401 of the primary law, *supra,* prohibiting a partisan primary candidate from having been a member of another party for 12 months and to have been affiliated with his own party for at least three months was held to be constitutional by the California Supreme Court as recently as 1968 in *Peace and Freedom Party. etc., et al.*

---

11. At the same time article II, section 2.5 was repealed, which provided in part that ". . . the Legislature shall enact laws providing for the direct nomination of candidates for public office, by electors, political parties, or organizations of electors without conventions, at elections to be known and designated as primary elections; also to determine the tests and conditions upon which electors, political parties, or organizations of electors may participate in any such primary election. . . ." The laws herein discussed were adopted before the "streamlining" of these provisions.

v. Jordan, as Secretary of State, et al., Sac. No. 7821. In such case the Peace and Freedom Party sought a judgment in the California Supreme Court declaring the 12-month and 3-month provisions of section 6401 unconstitutional on its face or as applied to them, in an attempt to broaden their base for candidates. By minute order, the California Supreme Court held section 6401 constitutional as follows:

> "Sac. 7821. *Peace and Freedom Party, etc., et al. v. Jordan, as Secretary of State, et al.* Petition denied. The relief requested is precluded by Section 6401 of the Elections Code, which is constitutional. This order is final forthwith. Justices Tobriner and Mosk are of the opinion that Elections Code Section 6401, while constitutional, was not intended to apply to persons in the positions of these petitioners."

See also, *Socialist Party v. Uhl*, 155 Cal.776, 792-94, 103 Pac. 181, 188-89 (1909), wherein the California Supreme Court, in upholding the *then* direct primary law, stated the party integrity concept in as relevant a manner as it could be stated today. See also, *Communist Party v. Peek*, 20 Cal.2d 536, 544-45, 127 P.2d 889, 894-95 (1942).

Of particular significance are the cases of *Bendinger v. Ogilvie, supra*, 335 F.Supp.572 (N.D.Ill.1971, three-judge court) and *Crowells v. Petersen, supra*, 118 So.2d 539, 540 (Fla.1960), both upholding "24-month rules" for party *candidacy* and *Lippitt v. Cipollone, supra*, 337 F.Supp. 1405 (N.D.Ohio, 1971, three-judge court), *aff'd mem*, 404 U.S. 1032 (1972), upholding Ohio's *4-year* rule as to party candidacy. Each of these cases sustained these restrictions as to candidacy in the interest of party integrity. If a state may require party membership for two years to insure party loyalty (*Crowells v. Petersen*), or deny party candidacy to those who were loyal to other parties within either two years (*Bendinger v. Ogilvie*) or four years (*Lip-*

pitt v. Cipollone) in the interest of party integrity, by a parity of reasoning California can require nonparty membership or deny independent candidacy to prior party members for a year or so to insure *true independent* status. By insuring true independent status the state is furthering the compelling state interest of preserving party integrity by preventing the splintering of political parties after a primary election. Such splintering could lead to the disintegration of the party system which is ". . . essential to the preservation and perpetuation of our political life." *Crowells v. Petersen, supra,* 118 So.2d 539, 540 (Fla. 1960).

The section 6830(d) restriction as to independent candidacy if the individual has been affiliated with a qualified party for one year prior to the primary election is not, as urged by appellants, a "purification period." Rather, it is merely a period of time sufficient to impose objective criteria as to true independent status. It thus insures objectively that an individual running as an independent candidate is not, in reality, attempting to splinter his party. A more narrowly drawn statute could not impose objective criteria.

Thus, sections 6830(d) and 6830(c), insofar as they prohibit an individual from being an independent candidate, further compelling state interests through statutes which are not overly broad.[12]

---

12. These provisions in effect overlap, assuming that section 6830(c) means that an independent candidate may not have voted at a *partisan* primary. This is because section 6830(d) was added in 1969 rounding out the "party integrity" statutes. See Cal.Stats. 1969, ch.948, p. 1894. Without qualified party affiliation, he could not have voted at a partisan primary. Section 6830(c), as to candidates, and standing alone, still promotes the compelling state interest of not being able to ". . . have it both ways." *Jackson v. Ogilvie, supra,* 325 F.Supp. 864 (N.D.Ill.1971, three-judge court), *aff'd mem.,* 403 U.S. 925 (1971).

Nagler v. Stiles, 343 F.Supp.415, (D.N.J.1972, three-judge court), *Yale v. Curvin,* 345 F.Supp.447 (D.R.I. 1972, three-judge court) and *Gordon v. Executive Committee of Democratic Party,* 335 F.Supp.166 (D.S.C. 1971, three-judge court) relied on by appellants are inapposite because they involved durational party requirements as to *voters,* not as to candidates. Compare, however, *Rosario v. Rockefeller, supra,* ..... U.S. ..... (1973), 41 L.W. 4401, March 21, 1973. In fact the distinction between regulation of candidates and voters, permitting more stringent regulations upon candidates, was noted in another case cited by appellants for another point in their brief. See *Pontikes v. Kusper,* 345 F.Supp. 1104, 1108-1109 (N.D.Ill.1972, three-judge court) prob. jur. noted 4/2/73, striking down Illinois' "party-raiding" statute. Additionally, we are not involved with "party raiding" in the sense used in the foregoing cases, but in possible party splintering and disintegration of the party system. Therefore, it would appear that appellants need not labor further in their attempt to understand what they have termed ". . . the conceptually difficult notion that one raids a political party when he leaves it. . . ." *Storer* brief, page 31. Neither the Secretary of State nor the court below has advanced such "notion" in the context that "party raiding" has been used in prior case law.

D. THE TWENTY-FOUR DAY REQUIREMENT FOR OBTAINING SIGNATURES SUSTAINS THE COMPELLING STATE INTEREST OF PERMITTING VOTERS TO DECIDE WHETHER THEY SHOULD SUPPORT INDEPENDENTS

Under the provisions of section 6833 in 1972 independent nomination papers were required to have been circulated between August 15 and September 8 for the November 7 general election.

> ". . . Obviously some time limit is required as a practical matter to assure that only qualified signa-

tures are obtained *and that the petitions reflect current attitudes of voters . . . .*" (Emphasis added.)

Moore v. Board of Elections for District of Columbia, supra, 319 F.Supp. 437, 440-41 (D.D.C. 1970, three-judge court), upholding 54 day circulation requirement. See also *Raza Unida Party v. Bullock, supra,* 349 F.Supp.1272, 1280-1281 (W.D. Tex. 1972, three-judge court), prob. jur. noted *sub. nom. American Party of Texas v. Bullock,* 3/5/73.[13]

The party nominees are not certified by the Secretary of State until after his official canvass, and the filing of campaign statements by candidates. Under the timing of the California Elections Code this last year (the dates will vary depending upon the primary date), the last date for filing the official canvass of the vote was July 15, 1972. California Government Code §§ 3750-3754; Elections Code §§ 11563-11565, 18471 and 6619.

Thereafter, and dependent upon the final determination of the nominees to ascertain the delegates thereto, state conventions are held in August at which party platforms are formulated. See generally §§ 8000, 8511, 8570, 8602, 9010, 9011, 9075, 9102, 9600 and 9601.[14]

---

13. *People's Party v. Tucker,* 347 F.Supp. 1 (M.D.Pa. 1972, three-judge court), relied upon by appellants fails to give proper recognition to the fact that the Communist Party met the 24-day requirement, and also fails to follow the *totality* approach of *Jenness v. Forston.* See dissenting opinion, *Id.* at 6, n. 5, 6-7.

14. For example, as to the Democratic Party, section 8570 requires the state convention to be held on a Saturday in August after each primary, to be designated by the party. As to the Republican Party, section 9075 requires their state convention to be held on the first Saturday in August after the primary. "Third Parties" are governed by the same rules as the Democratic Party. § 9601. The party platforms are adopted not later than the next day. §§ 8602 and 9102. The convention consists of holdover state and federal officers, nominees, and persons chosen to fill any vacancies. §§ 8511 and 9011.

It is certainly compelling that the candidates be officially designated and party platforms announced before voters decide whether to support existing party candidates or individuals desiring to run as independents. In California, as in Washington, D.C.,

> ". . . There is no restriction as to when a candidate, whether he stands in a primary or as an independent in the general election, may declare his candidacy and no time restriction on political activity. Indeed any candidate may solicit promises of signatures for his petition well before the permissible date for obtaining actual signatures."

Moore v. Board of Elections for District of Columbia, supra, 319 F.Supp. 437, 438 (D.D.C. 1970, three-judge court).

The time after September 8, 1972 was required for checking signatures and preparing for the election. It is to be emphasized that in California, absentee voting starts 29 days before the date of the general election. All candidates must be determined and ballots ready for such purpose by that time. In 1972, such date was October 10, 1972, § 14620 *et seq.*

With the interests to be protected by the 24-day period, a longer period of time within which to circulate nomination papers would not be possible.

V. California Elections Code, Sections 6830(c) and 6830(d) Do Not Impose an Additional Qualification for the Office of Congressman, But Are Legitimate State Regulations Pursuant to Article I, Section 4 of the United States Constitution

The court below correctly pointed out that "Legislatures of the respective states have broad powers granted by Article I, Section 4 [of the United States Constitution] . . . to regulate the conduct of elections . . . for . . . Representatives. . . ." Appendix, p. 89.

Appellants spend almost one-third of their brief in *Storer* (pp. 38-56) arguing that the sole qualifications for Congress are those set by article I, section 2, clause 2 of the United States Constitution. Appellee Secretary of State has no particular reason to dispute this contention as a general proposition since it is his position that section 6830(c) and 6830(d) do not add an additional qualification for the office of Representative in Congress.[15]

Section 6830(c) and 6830(d) merely impose upon independent candidates a regulation as to running for office. If they voted at the preceding primary,[16] or if they have elected to leave a qualified party within one year of the primary election, they merely may not run for office, including that of Representative in Congress, as an independent. However, if they are affiliated with a qualified party they may run for Congress. Also even if they may not be an independent nominee, they may still be a write-in candidate. There are three routes to candidacy. Choosing a course of action which closes one of three alternatives canot be considered having added an additional qualification to the office of United States Representative. Candidacy is available. The choice is the individual's.

This is explained quite well in the case of *Roberts v. Cleveland*, 48 N.M. 226, 149 P.2d 120 (1944). In such case, which is very analogous to our situation, the Supreme Court of New Mexico held that a statute prohibiting a

---

15. We do, however, dispute appellants' statement at note 33, page 56 of their brief that *MacDougall v. Green*, 335 U.S. 281 (1948), found the requirement of signature gathering for statewide office nonjusticiable. See *Moore v. Ogilvie*, 394 U.S. 814, 816-17 (1968), explaining the substantive holding of the majority of the court.

16. The same considerations are applicable herein as to whether having voted at the preceding primary election includes having voted a nonpartisan ballot. See text at note 9, *supra*.

person from nomination to any office who had changed his party affiliation within 12 months of the Governor's election proclamation did not constitute a qualification for election to the office of Representative in Congress. The following language of the court is instructive, 149 P.2d at 122:

> ". . . The right to be a candidate at the general election by the 'write in' method is provided for. He may be such candidate, independently of all parties; or, if he affiliates with any political party he may have his name upon the ballot at the general election as the candidate of that party provided he comes within the regulations and restrictions provided in the Primary Election Law. . . ."

This same distinction between an election regulation and a qualification for federal office was applied by the court in Nebraska.

In *State v. Swanson*, 128 Neb. 21, 257 N.W. 255 (1934), the Supreme Court of Nebraska pointed out this distinction with regard to a similar contention regarding a gubernatorial candidate defeated at the primary who wished to be a U.S. Senate candidate by petition at the general election. The court held at 257 N.W. at 255-56:

> ". . . The issue here is whether the relator is entitled to have his name printed on the ballot as a candidate nominated by petition, regardless of the Driscoll decision, because the office relator seeks is a federal office rather than a state office. The question is not whether he may be a candidate, but whether he may be nominated by petition and have his name printed on the ballot at the state's expense. *He may be a candidate and if electors write his name on the ballot in sufficient numbers he will be elected.*
>
> • • •
>
> "The Legislature considered it an evil for one who had unsuccessfully submitted his candidacy at the

primary to be allowed to be nominated later as a candidate for the same or for another office, and again to be permitted to have his name printed upon official ballots at the expense of the public.

"Relator has all the qualifications for office of Senator. The state statute in no manner seeks to add other qualifications. It does not prevent him from being a candidate. It is not unconstitutional, as clearly appears from the decision of the Supreme Court of the United States.

"The refusal of the secretary of state to accept the nominating petition and relator's acceptance thereof is fully justified. The writ is therefore denied." (Emphasis added.)

Thus, so long as an individual remains capable of being chosen for office, as was the case with Messrs. Storer and Frommhagen herein, the United States Constitution is in no way violated, since California's laws go to the manner of holding elections. *Cf. State ex rel Davis v. Adams,* 238 So.2d 415 (Fla.1970); *Secretary of State v. McGucken,* 244 Md. 70, 222 A.2d 693 (1966).

All the cases relied upon by appellants in their brief involved state laws which imposed an *absolute* disqualification as to candidacy. In fact, a number of the cases relied upon by appellants either cited, explained or distinguished *State v. Swanson, supra,* 128 Neb. 21, 257 N.W.255 (1934). These are *Shubb v. Simpson,* 196 Md.177, 76 A.2d 332, 341 (1950), appeal dismissed as moot, 340 U.S. 881 (1950); *State v. Crane,* 65 Wyo. 189, 197 P.2d 864, 870-71 (1948); *State v. Thorson,* 72 N.D.246, 6 N.W. 2d 89, 91 (1942), and the recent federal case, *Stack v. Adams,* 315 F.Supp. 1295, 1298 (N.D. Fla.1970, three-judge court). As explained in this latter case:

"The act, in essence, provides that a state public office holder who has not resigned his state office in

accordance with the Act cannot be a candidate for or be elected to Congress—it is a flat disqualification. Plaintiff, who has not resigned his office, even though he meets all of the qualifications prescribed by the United States Constitution, is, under the Florida act, disqualified to run because he is a state office holder of Florida, and has not resigned his position.

"Even State ex rel. O'Sullivan v. Swanson, 127 Neb. 806, 257 N.W. 255 (1934), does not, in principle, depart from the holding of the other state cases. In *O'Sullivan*, the court pointed out that a person seeking to file in the next general election contrary to its statute might still run for the federal office and be elected on the write-in ballot, although he could not have his name placed upon the ballot at state expense. Such might have been a strong practical deterrent to election, *but nonetheless, he could run. . . .*" (Emphasis added.)

Thus, sections 6830(c) and 6830(d) do not impose an additional qualification for office, but constitute merely regulating the manner of holding elections for Congress as permitted by the United States Constitution, article I, section 4, clause 1.

VI. California's Write-in Process Presents an Additional Alternative to Satisfy the Constitutional Rights of Appellants to Participate in the Election Process

As was pointed out at the outset of the argument herein, in I, *supra*, California insures the fluidity of political life in California through numerous alternative means to the ballot. One of these is the write-in procedure applicable to both primary and general elections. §§ 6260-6263, 10229 and §§ 10213, 10228, 10292, 10317 and §§ 18600-18604.

Also, as heretofore pointed out, section 6430 already protects the rights of individuals and potential candidates who are dissatisfied with the current "qualified parties" in

California to associate, organize, and campaign for new schools of thought. Thus, even absent the Independent Nomination Procedure, the write-in process in California satisfies whatever residual rights appellants may have to participate in California's electoral process. *Jenness v. Forston, supra,* 403 U.S. 431, 438 (1971).

Cases both before and after *Williams v. Rhodes, supra,* 393 U.S. 23 (1968), point out the necessity *and efficacy* of the write-in process in satisfying constitutional rights to run for office. The efficacy of the write-in process has, in fact, been recently recognized by this Court in its summary affirmance of a case arising in Florida. In *Beller v. Kirk, supra,* 328 F.Supp.485, (S.D. Fla.1970, three-judge court), *aff'd sub nom., Beller v. Askew,* 403 U.S. 925 (1971), where the court upheld Florida's three percent signature requirement for new parties, the court also held:

> "The State has the right and duty to establish reasonable regulations for the conduct of elections for state offices. *There is no constitutional right to have one's name printed on the ballot. . . .*" (Emphasis added.) *Id.* at 486.

The court further stated:

> ". . . While not having one's name printed on the ballot may put him to some disadvantage in relation to one whose name does appear on the ballot, this does not constitute invidious discrimination, nor is it unconstitutional. *Ibid.*

In a recent New Jersey case, the Third Circuit Court of Appeals upheld the constitutionality of a restriction against a candidate who was defeated at the primary election from filing as an independent candidate in the general election. In such case, *Mammon v. Schatzman,* 472 F.2d 114, 115 (C.A.3 1972), the court noted as to such "independent's" supporters:

"The appellants other than Mammon contend that the statutory restrictions which preclude Mammon's name from appearing on the November ballot are unreasonably in derogation of their right to vote for him, the candidate of their choice. *But, they have a right under the New Jersey statute to cast 'write in' votes for him.* Moreover, once it is concluded that Mammon is not constitutionally aggrieved by his inability to have his name appear on the ballot, we see no rational basis for conferring upon his would be supporters a constitutional right to find his name there." (Emphasis added.)

In *Shankey v. Staisey,* 436 Pa. 65, 257 A.2d 897, 899, (1969), *cert.denied,* 396 U.S. 1038 (1970), the court stated:

"... By providing for write-in vote, the Elections Code gives every elector the right to vote for whomever he chooses. The right of a candidate to have his name on the ballot is not such an absolute one, however, because there is a competing interest at stake—the avoidance of an unduly complicated ballot which may confuse the voter and make impossible the use of voting machines...."

See also, *e.g., Sullivan v. Grasso,* 292 F.Supp.411, 412 (D. Conn.1968, three-judge court); *Socialist Labor Party v. Rhodes,* 290 F.Supp. 983 (S.D.Ohio, 1968, three-judge court), modified, 393 U.S. 23, 35 (1968); *Spreckles v. Graham,* 194 Cal.516, 533-34; 228 Pac. 1040, 1046 (1924).[17]

---

17. Compare, however, *Williams v. Rhodes, supra,* 393 U.S. 23, 37 (1968), concurring opinion of Mr. Justice Douglas. Compare also cases such as the following, cited by appellants Storer and Hall in their opening brief for other points: *Manson v. Edwards,* 345 F.Supp. 719 (S.D.Mich.1972); *Jenness v. Little,* 306 F.Supp. 925 (N.D.Ga.1969, three-judge court), appeal dismissed as moot, 397 U.S.94 (1970); *Ragan v. Junkin,* 85 Neb. 1, 122 N.W. 473 (1909), and *Holliday v. O'Leary,* 43 Mont. 157, 115 P.204, (1911). *Manson v. Edwards, supra,* involved an age requirement. An under age write-in candidate could never have been elected. *Jenness*

Thus, there is no constitutional right to have one's name printed on the ballot, nor is there a constitutional right for supporters of a candidate to find his name printed there. In response to the usual argument that the write-in process is meaningless, the following is pointed out, and was pointed out to the court below. In the 1972 primary election an incumbent Democratic Congressman won the nomination of the Republican Party through the write-in process, as well as that of his own party through the conventional printed ballot. Admittedly, there was no declared Republican opposition. The significant fact, however, is that over 5,000 write-in votes were cast for various write-in candidates for the Republican congressional nomination in such district. See Exhibit H to appellee's Points and Authorities filed August 18, 1972.

Thus, the write-in process, at least in California, is not illusory. Voters can and will use it when there is the requisite motivation to do so.

VII. California's Independent Nomination Procedure in No Way Invidiously Discriminates in Favor of Established Political Parties. It Is an Additional Alternative for New Groups and Candidates to Qualify for Ballot Space

Appellants take umbrage with the fact that pursuant to section 6430 subdivision (a) a party remains a "qualified party" if it polled at least 2 percent of the *statewide vote* at the last gubernatorial election, whereas independents must obtain signatures of 5 percent of the vote cast *in the area* at the preceding general election. The underscored language demonstrates right away that appellants are

---

v. Little, supra, was a filing fee case. Therefore, a candidate has no other alternative means to the ballot. *Ragan v. Junkin, supra,* was decided upon the State Constitution and also involved a situation without reasonable alternatives. *Holliday v. O'Leary, supra,* also involved no alternative means to the ballot.

attempting to equate two different concepts—one a statewide vote for party qualifications, the other an area vote for candidacy for a single office.

This is brought into relief when one considers appellants Hall and Tyner, who are members of the Communist Party. They, of course, could not qualify pursuant to subdivision (a) of section 6430, since they are not members of a qualified party. However, their party, and persons who espouse the beliefs of the party, still had and have the options of satisfying subdivision (c), the 1 percent registration provision, or subdivision (d), the 10 percent signature provision. As has been pointed out, in 1968 both the American Independent Party and the Peace and Freedom Party qualified under the liberal provisions of subdivision (c) of section 6430.[18] Unable to meet these liberal registration requirements, the Communist Party apparently decided to run their candidates Hall and Tyner as "independents." They, however, cannot claim invidious discrimination. Their constitutional right to ballot space was already protected by section 6430. It cannot be said that 2 percent of the vote is less burdensome than a 1 percent registration requirement.[19] *Cf. Jenness v. Forston, supra,* 403 U.S. 431, 440-41 (1970). Consequently, the Independent Nomination Procedure, which they attempted to utilize, presented an additional alternative for the party, *a legislative bonus.*

---

18. Interestingly, in *Williams v. Rhodes, supra,* 393 U.S. 23, 47, n.7 (1968), concerning opinion of Mr. Justice Harlan, California was apparently grouped with the overwhelming majority of states which had a 1 percent or fewer "signature requirement."

19. The 1/15th of one percent requirement of section 6430 is an *additional* test for already qualified parties to meet. Such an additional test or burden was not even found in Georgia as to parties which qualified by a percentage of the prior vote. In Georgia, affiliation could be zero, and the party would still be qualified.

Likewise, any person or group wishing to espouse thoughts *on a statewide basis* may qualify for ballot space under the provisions of section 6430 even if they consider themselves "independents."[20] Therefore, they also cannot claim "invidious discrimination" from the provisions of the Independent Nomination Procedure, an additional alternative for new groups and the espousal of new ideas.

Therefore, this leaves only the claim of invidious discrimination by the *local* candidate for a "local office."

The local candidate, such as Messrs. Storer and Frommhagen, without a statewide base or aspirations, would utilize the Independent Nomination Procedure to run for local *partisan* office, such as Congress or State Senate or Assembly. Thus, the procedure is basically a means for "nonpartisans" to run for partisan office. In effect, they are trying to change a partisan election into a nonpartisan election, at least as to themselves. This being the case, what can they claim as a "fair" method of access to the ballot? No party candidate may get on the ballot with a *petition* signed by 2 percent of the vote. A party candidate must win at the primary election. Can it be said that winning at the primary election is any less burdensome than a 5 percent signature requirement?[21] *Cf. Jenness v. Forston, supra,* 403 U.S. 431, 440-41 (1970). Additionally, the state has a compelling interest in protecting the party system and party integrity. As the court below, and with a great deal of logic, held, there is no reason for the state to make it easy for independents to gain ballot space. Stated otherwise, the state has a rational and compelling state interest

20. See note 5, *supra.*

21. This point, though not necessary to nullifying the statewide candidate's claim to invidious discrimination, is however, equally applicable to him. Also a 5 percent signature requirement in and of itself is not attacked by appellants.

in seeing that its races for partisan office, which affect the state as a whole, are not essentially turned into races for nonpartisan offices by numerous local splinter groups of the so-called disaffected. The state may protect the party system.

In short, one set of rules apply to party candidates. Another set of rules apply to "independents." Both prescribe completely different routes for a candidate to attain ballot position. Neither can be said to be more or less burdensome than the other. *Cf. Lyons v. Davoren,* 402 F.2d 890, 893 (C.A.1 1968), *cert. denied,* 393 U.S. 1081 (1969); *Jackson v. Ogilvie, supra,* 325 F.Supp. 864, 868, *aff'd mem,* 403 U.S. 925 (1971); *Wood v. Putterman* 316 F.Supp. 646, 650-51, *aff'd mem,* 400 U.S. 859 (1970); *Christian Nationalist Party v. Jordan, supra,* 49 Cal.2d 448, 455, 318 P.2d 473, 476 (1957); *Socialist Party, U.S.A. v. Jordan,* 49 Cal.2d 864, 318 P.2d 479 (1957), *cert. denied,* 356 U.S. 952 (1957).

VIII. Assuming, Arguendo, That Any of the Provisions of the Independent Nomination Procedure Are Invalid, the Invalid Portion or Portions Should Be Severed, Leaving the Remainder of the Law Operative

Section 48 provides:

> "If any provision of this code or the application thereof to any person or circumstance is held invalid, the remainder of the code and the application of such provision to other persons or circumstances shall not be affected thereby."

Therefore, assuming, *arguendo,* that the court should hold any of the provisions of the Independent Nomination Procedure invalid, the remaining provisions should still be left operative. For example, the Legislature would still desire the 5 percent signature requirement to remain in effect even were the Court, for example, to consider the 24-day period

for obtaining signatures too stringent. Likewise, the Legislature under section 48 would want the 5 percent signature requirement to remain in effect even were the court to believe that all electors should have the opportunity to sign independent nomination petitions.

In short, appellants urge the court to invalidate *all the substantive provisions* of the Independent Nomination Porcedure, and yet leave the procedural provisions operative. If appellants were to have their way, the Independent Nomination Procedure would be left with the requirements of merely filing a piece of paper with the appropriate election official to gain ballot position. Section 48 does not prescribe such a result, but prohibits it.[22] *Cf. Curtis v. Board of Supervisors,* 7 Cal.3d 942, 964, 104 Cal.Rptr. 297, 312-13, 501 P.2d 537, 552-53 (1972).

As stated in *Oregon v. Mitchell,* 400 U.S. 112, 131 (1970):

> ". . . it is a longstanding canon of statutory construction that legislative enactments are to be enforced to the extent that they are not inconsistent with the Constitution, particularly where the valid portion of the statute does not depend upon the invalid part. . . ."

IX. Appellants' Arguments in Storer and Hall Are Lacking in Merit

It is believed that the foregoing exposition of the facts and the law, and comments upon positions taken by appellants Storer and Hall traverses all the significant contentions presented by them, and demonstrates that their arguments are lacking in merit. However, we do wish to add

---

22. The Secretary of State urged severability below also. However, at such time we were not aware of section 48 and advised the court that there was no severability clause in the statute. See reporter's transcript, p. 28. For appellants Storer and Halls' position on severability below, see reporter's transcript, pp. 45-48. Compare *Ragan v. Junkin, supra,* 85 Neb. 1, 122 N.W. 473, (1909), cited by appellants for another point, where severance was not possible.

a few additional comments for the purpose of futher demonstrating the error of their arguments.

At page 23 of their brief, appellants Storer and Hall make the erroneous statement that the only justification we have advanced as a compelling state interest for upholding the Independent Nomination Procedure is keeping the ballot size manageable. Below, and herein, we have demonstrated that many of the provisions of the Independent Nomination Procedure advance the compelling state interest of insuring the preservation of party integrity and the party system.

Insofar as appellants at page 26 of their brief urge that the signatures for independent nominees must be collected in too short a period from an unidentifiable group of voters, we additionally point out (1) that nothing prevents independents from declaring their candidacy in advance, and soliciting promises of signatures in advance, see *Moore v. Board of Elections for District of Columbia, supra,* 319 F.Supp. 437, 438 (D.D.C. 1970, three-judge court), and (2) any group of voters is unidentifiable in any group of adults *until you ask them* their status or qualifications.

With regard to appellants' contention that it is virtually impossible for independents to appear on the ballot, we submit the following response: Have appellants examined all the records of the Secretary of State since the procedure was first instituted in the 19th century? To our knowledge, they have not. In fact, an individual *qualified and ran as an independent* for State Assembly, 40th District, at the November 1972 General Election.[23] The Secretary of State has

23. Certified List of Candidates, General Election, November 1972, compiled by Edmund G. Brown, Jr., Secretary of State. This is not reflected in the record below, but is a matter subject to judicial notice.

not undertaken to examine all his records to attempt to disprove this assertion of the appellants. Other examples perhaps might be uncovered. In *Baird v. Davoren, supra,* 346 F.Supp.515 (D.Mass.1972, three-judge court) the court upheld the independent nomination procedure against the contention that only twice in 33 years had independent candidates qualified for the ballot. Thus, where alternative means of access to candidacy exist, difficulty is not the equivalent of unconstitutionality.

Also, we do not understand appellants' position taken at pages 16 and 17 of their brief to the effect that an independent must wait 17 months from the time he defects from a qualified party before he may be a candidate, whereas a "genuine party hopper" is only required to wait seven months. Both sections 6401 and 6430 contain one year "non-affiliation" provisions. Also appellants try to measure the time prior to different elections, that is, the primary for the "party hopper" and the general for the "independent." Since a "party hopper" must file several months before the primary, he will have had to have disaffiliated with his *prior party* for *more* than 17 months before he can find his name on the *general election* ballot. §§ 6401, 6490. Appellants' argument, therefore, is in error.

Finally, with regard to appellants Hall and Tyner, we wish to emphasize that the 25,000 signatures alleged to have been collected were never verified as genuine signatures. The timing of the lower court's decision herein was (in the writer's personal knowledge) such as to preclude the necessity for a complete verification. Verification had commenced, but was halted. It is also to be noted that as to appellants Hall and Tyner, the Secretary of State took the position below that they and their supporters had no standing to sue because they proposed themselves as *direct* candidates for President and Vice President. The Inde-

pendent Nomination Procedure contemplates the independent nomination of a slate of presidential electors. §§ 6800, 6803, 6804. It was our position, and basically still is, that only a slate of electors would have had standing. See Appendix, page 52. Appellee's Points and Authorities filed August 25, 1972, pp. 5-6.

X. Additional Arguments of Appellant Frommhagen Are Also Lacking in Merit

Since Mr. Frommhagen has adopted the "Summary of Argument" of appellants Storer and Hall, most of the foregoing arguments of our brief are equally applicable to Mr. Frommhagen. They also traverse most of Mr. Frommhagen's contentions.

One point Mr. Frommhagen raises is new. He submits a letter from the Secretary of State of Georgia that no independent candidate qualified to run for Congress in 1968, 1970 and 1972. He then proposes that the 5 percent signature requirement and the filing fee standing alone should suffice to prevent a "laundry list" ballot. The argument fails to recognize two distinctions. California law *also* is designed to preserve party integrity, a compelling state interest. Secondly, what may be enough in Georiga, may not necessarily be enough in California. If access to the ballot were virtually unfettered, where would one more likely expect to find a "laundry list" ballot, in Athens, Georgia, or Berkeley, California? The answer should be obvious.

Finally, we wish to reemphasize that the freedom of anyone to sign a nominating petition in Georgia vis-a'-vis California's restriction is illusory. Whether in Georgia or in California, party affiliation or loyalty effectively removes a vast segment of persons from the pool of signers of independent nomination petitions.

XI. The Brief of Amicus Curiae Raises New Legal and Factual Issues Not Raised Below

Amicus curiae, The Committee for Democratic Election Laws, has filed a brief which attacks *solely* the 5 percent requirement of the Independent Nomination Procedure.

As was pointed out and documented in our Statement of the Case, neither appellants Storer nor Hall contended that the 5 percent requirement in and of itself was invalid, and virtually conceded its validity. Appellant Frommhagen has no argument with the 5 percent requirement by itself. Therefore, amicus curiae attempt to interject a new legal issue into this case not considered by the court below. In fact we declined to agree to their submitting a brief primarily on this basis.[24] Thereafter, and apparently without serving us with a copy of their motion,[25] they moved for leave to file their brief, which motion was granted. Based upon the foregoing alone, it would seem that the brief of amicus curiae should not even be considered by the Court.

However, an examination of their brief compounds this belief. It contains a 10 page affidavit of the Socialist Workers Party as to their version of why, *factually*, they did not even attempt to qualify for the ballot in California. Thus, a nonparty to these actions is submitting hearsay factual allegations to the United States Supreme Court which were never presented to the court below, or tried or decided by the court below. We submit this is a blatant improper attempt to try the case of the Socialist Workers

---

24. Letter to Mr. Reosti dated April 11, 1973, re The Committee for Democratic Election Laws, copy to the Clerk.

25. Therefore, we were not accorded the opportunity to oppose their motion. By letter to Mr. Reosti dated May 14, 1973, re The Committee for Democratic Election Laws, copy to the Clerk, we advised amicus that we had received notice of the granting of their motion to file as amicus, and would be interested in receiving a copy of their motion. It has not been received to this date.

Party as a matter of first impression before this Court. We therefore, will not, nor do we see why we should, attempt to answer the brief of amicus in any detail.

Several things were of interest, however, to us. At pages 4 and 5 of amicus curiae's brief, they state that in 1972 no candidate qualified in California under the 5 percent requirement. This is, of course, incorrect. See text at note 23, *supra*. Their research is also incorrect. They state at page 5 of their brief that since 1948 no party except the "American Independence Party" [sic] has gained ballot status in California or other enumerated states.

Thus, if amicus had even read our Motion to Affirm at page 16 they would know that in 1972 an independent qualified in California. If amicus had merely read the court's decision below they would have discovered that California had *four* parties on the ballot in 1972. This would have provided the clue (or reading our Motion to Affirm would have provided the answer) that the Peace and Freedom Party also qualified for ballot status in 1968. Even communication with appellants could have elicited this basic fact.

Insofar as amicus curiae attempts to claim that the signature requirements impose a wealth requirement on candidacy, we believe that the following language of the California Supreme Court provides the cogent answer. The court, against a similar contention as to the predecessor to section 6430 stated in *Christian Nationalist Party v. Jordan, supra,* 49 Cal.2d 448, 454-55, 318 P.2d 473, 476 (1957):

> "It is true, of course, that a presently insubstantial group may be required to make expenditures in seeking qualification, but any numerical test would have the same effect. The statute does not impose any financial requirement but only restrictions based on numerical data, and the circumstance that every group call-

> ing itself a party may not be able to obtain funds which it estimates would enable it to win the necessary support among the voters of the state does not show that the restrictions are not reasonably designed to advance a vital public purpose. . . . It must again be emphasized that the subdivisions under which non-participating parties may qualify are alternatives, and they may not be taken separately in considering whether they are discriminatory. While the percentage in subdivision (c) is substantially larger than that in subdivision (a), the percentage in subdivision (b) is only one-third as great. In view of the weight to be accorded legislative determinations in this field, section 2540 may not be regarded as discriminating among parties of the same size."

If amicus curiae believes the 5 percent requirement is unduly burdensome, let "independent parties" utilize the California's 1 percent registration alternative of section 6430 which is available to them, or let individual independent candidates utilize the write-in procedure.

CONCLUSION

California's Election Laws, viewed in their totality, provide reasonable and viable means for the qualification of third parties and "independent parties" under the provisions of section 6430. In fact under the liberal provisions of subdivision (c) of this section, there could be 100 parties qualified in California. The fluidity of political life is insured by this section alone. Therefore, the Independent Nomination Procedure need only meet the "rational basis test." It is a true legislative bonus!

However, even assuming the Independent Nomination Procedure must pass the strict scrutiny test, it does, serving the compelling interests of protecting the ballot from

proliferation as well as protecting the party system from disintegration.

Individual candidates, not wishing to avail themselves of section 6430 or 6800 *et seq.*, may still be write-in candidates.

The court below correctly analyzed California's laws and correctly held that there are an adequate number of routes to the ballot to satisfy appellants' fundamental political and associational rights and rights to equal protection of the laws.

It is respectfully submitted that the judgment below should be affirmed.

Dated: July 13, 1973

EVELLE J. YOUNGER
Attorney General of the
State of California

IVER E. SKJEIE
Assistant Attorney General

CLAYTON P. ROCHE
Deputy Attorney General

Attorneys for Appellee
Edmund G. Brown, Jr.

[Appendices Follow]

Appendix A

Constitutional Provisions

United States Constitution, Article I, Section 4, Clause 1:

"1. The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators."

United States Constitution, Article II, Section 1, Clause 2:

"2. Each State shall appoint, in such manner as the Legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector."

California Constitution, Article II, Section 4:

"Sec. 4. The Legislature shall provide for primary elections for partisan offices, including an open presidential primary whereby the candidates on the ballot are those found by the Secretary of State to be recognized candidates throughout the nation or throughout California for the office of President of the United States, and those whose names are placed on the ballot by petition, but excluding any candidate who has withdrawn by filing an affidavit that he is not a candidate." (Added Nov. 7, 1972.)

Appendix B

California Elections Code Provisions Defining Qualified Parties—Also Signature Requirements

§ 6430. Qualified parties

"A party is qualified to participate in any primary election:

(a) If at the last preceding gubernatorial election there was polled for any one of its candidates who was the candidate of that party only for any office voted on throughout the State, at least 2 percent of the entire vote of the State; or

(b) If at the last preceding gubernatorial election there was polled for any one of its candidates who, upon the date of that election, as shown by the affidavits of registration of voters in the county of his residence, was affiliated with that party and was the joint candidate of that party and any other party for any office voted on throughout the State, at least 6 percent of the entire vote of the State; or

(c) If on or before the 135th day before any primary election, it appears to the Secretary of State, as a result of examining and totaling the statement of voters and their political affiliations transmitted to him by the county clerks, that voters equal in number to at least 1 percent of the entire vote of the State at the last preceding gubernatorial election have declared their intention to affiliate with that party; or

(d) If on or before the 135th day before any primary election, there is filed with the Secretary of State a petition signed by voters, equal in number to at least 10 percent of the entire vote of the State at the last preceding gubernatorial election, declaring that they represent a proposed party, the name of which shall be stated in the petition, which proposed party those voters desire to have partici-

pate in that primary election. This petition shall be circulated, signed, verified and the signatures of the voters on it shall be certified to and transmitted to the Secretary of State by the county clerks substantially as provided for initiative petitions. Each page of the petition shall bear a caption in 18-point blackface type, which caption shall be the name of the proposed party followed by the words 'Petition to participate in the primary election.' No voters or organization of voters shall assume a party name or designation which is so similar to the name of an existing party as to mislead voters.

Whenever the registration of any party which qualified in the previous direct primary election falls below one-fifteenth of 1 percent of the total state registration, that party shall not be qualified to participate in the primary election but shall be deemed to have been abandoned by the voters, since the expense of printing ballots and holding a primary election would be an unjustifiable expense and burden to the State for so small a group. The Secretary of State shall immediately remove the name of the party from any list, notice, ballot, or other publication containing the names of the parties qualified to participate in the primary election."

§ 6495. Number of sponsors required

"The number of sponsors required for the respective offices are as follows:

(a) State office or United States Senate, not less than 65 nor more than 100.

(b) House of Representatives in Congress, State Senate or Assembly, Board of Equalization, or any office voted for in more than one county, and not statewide, not less than 40 nor more than 60.

(c) Candidacy in a single county or any political subdivision of a county, other than State Senate or Assembly, not less than 20 nor more than 30.

(d) When any political party has less than 50 voters in the state or in the county or district in which the election is to be held, one-tenth the number of voters of the party.

(e) When there are less than 150 voters in the county or district in which the election is to be held, not less than 10 nor more than 20."

§ 6080. "Basis of percentage" (Presidential Primary)

"As used in this article, 'basis of percentage' means:

(a) If a party's candidate for Governor was the candidate of the party alone, the vote polled for the party's candidate for Governor at the last preceding general election at which a Governor was elected.

(b) If a party's candidate for Governor was not the candidate of that party alone, the vote polled at the last preceding general election by that one of the party's candidates voted on throughout the State who received the greatest number of votes of all of the party's candidates who were the candidates of that party alone.

(c) If a party had no candidate voted on throughout the State who was the candidate of that party alone, the vote polled at the last preceding general election by that one of the party's candidates voted on throughout the State who received the greatest number of votes of all the party's candidates who were the candidates of the party in conjunction with one or more other parties."

§ 6082. Signatures on nomination papers (Presidential Primary)

"Nomination papers for candidates for delegates of any party shall be signed by not less than one-half of 1 percent

and not more than 2 percent of the vote constituting the basis of percentage."*

---

*See also §§ 6345 and 6347 for similar requirements applicable solely to Democratic Party.

Appendix C

California Elections Code Provisions Providing for Write-in Candidates

§ 6260. Ballot; space for write-in

"Notwithstanding any other provisions of law, a space shall be provided on the presidential primary ballot for an elector to write in the name of a candidate for President of the United States."

§ 6261. Candidate's endorsement of candidacy; filing

"Any person who believes his name may be used as a write-in candidate for President of the United States shall, not later than eight days before the primary election, file his endorsement of his write-in candidacy with the Secretary of State, or no votes shall be counted for him."

§ 6262. Delegates to national convention; selection by candidate

"Any person who receives, by write-in vote, a plurality of the votes cast for President of the United States shall, within 10 days after the primary election, file a list of delegates to the national convention of his political party with the Secretary of State in the manner prescribed in Sections 6053 and 6054."

§ 6263. Delegates to national convention; selection by state central committee

"If the candidate fails to file a list of delegates, the state central committee of the party in whose primary the candidate received the plurality vote shall within 10 days of the end of the 10-day period required in Section 6262, file a list of delegates with the Secretary of State. The delegation shall go to the convention unpledged to any candidate."

§ 10213. Ballot size

"A ballot shall not exceed 24 inches in length, and shall be three inches in width and as many times that width as may be necessary to contain all of the names of candidates nominated, with proper blank spaces to allow the voter to write in names not printed on the ballot. The ballot shall also contain a separate column or columns of sufficient width for statements of all measures submitted to the voters."

§ 10229. Instructions to voters; presidential electors; party electors

"In elections when electors of President and Vice President of the United States are to be chosen, there shall be placed upon the ballot, in addition to the instructions to voters as provided in this article, an instruction as follows: 'To vote for all of the electors of a party, stamp a cross (+) in the square opposite the names of the presidential and vice presidential candidates of that party. A cross (+) stamped in the square opposite the name of a party and its presidential and vice presidential candidate, is a vote for all of the electors of that party, but for no other candidates.' This instruction shall appear immediately before the words: 'To vote for a person not on the ballot.'

If a group of candidates for electors has been nominated under the provisions of Chapter 3 (commencing at Section 6800) of Division 5, and has under the provisions of Article 1 (commencing at Section 6800) of that chapter designated the names of the candidates for President and Vice President of the United States for whom those candidates have pledged themselves to vote, the instructions to voters shall also contain the following:

'To vote for those electors who have pledged themselves to vote for a candidate for President and Vice President not supported by any particular party stamp a cross (+) in the square opposite the names of those presidential and vice presidential candidates.'

If a group of candidates for electors has been nominated by a party not qualified to participate in the election, the instructions to voters shall also contain the following:

'To vote for those electors who have pledged themselves to vote for a candidate for President and for Vice President of any party not qualified to participate in the election write in the names and party of those presidential and vice presidential candidates in the blank space provided for that purpose.'

The names of presidential and vice presidential candidates and a list of presidential electors of nonqualified political parties shall be filed with the Secretary of State at least 60 days prior to the election."

§ 18600. Write-in votes

"Any name written upon a ballot shall be counted, unless prohibited by Section 18603, for that name for the office under which it is written, if it is written in the blank space therefor, whether or not a cross (+) is stamped or made with pen or pencil in the voting square after the name so written."

§ 18601. Declaration required

"Every person who desires to have his name as written on the ballots of an election counted for a particular office shall file a declaration stating that he is a write-in candidate for the nomination for or election to the particular office and giving the title of that office."

§ 18602. Declaration; filing

"The declaration required by Section 18601 shall be filed no later than the eighth day prior to the election to which it applies. It shall be filed with the clerks, registrar of voters, or district secretary responsible for the conduct of the election in which the candidate desires to have write-in votes of his name counted."

§ 18603. Requirements for tabulation of write-in vote

"No name written upon a ballot in any state, county, city, city and county, or district election shall be counted for an office or nomination unless

(a) A declaration has been filed pursuant to Sections 18601 and 18602 declaring a write-in candidacy for that particular person for that particular office or nomination and

(b) The fee required by Section 6555 is paid when the declaration of write-in candidacy is filed pursuant to Section 18602."

§ 18604. Write-in votes in primary election

"In a primary election, write-in votes shall be counted for each person whose name appears on a ballot as a candidate for nomination for the same office by another party, notwithstanding his failure to comply with the provisions of Sections 18601, 18602, and 18603."

Appendix D

California Elections Code Provisions—Direct Primary Law—Relating to Party Integrity

§ 6401. Party affiliation

"No declaration of candidacy for a partisan office or for membership on a county central committee shall be filed, either by the candidate himself or by sponsors on his behalf, (1) unless at the time of presentation of the declaration and continuously for not less than three months immediately prior to that time, or for as long as he has been eligible to register to vote in the state, the candidate is shown by his affidavit of registration to be affiliated with the political party the nomination of which he seeks, and (2) the candidate has not been registered as affiliated with a political party other than that political party the nomination of which he seeks within 12 months immediately prior to the filing of the declaration.

The county clerk shall attach a certificate to the declaration of candidacy showing the date on which the candidate registered as intending to affiliate with the political party the nomination of which he seeks, and indicating that the candidate has not been affiliated with any other political party for the 12-month period immediately preceding the filing of the declaration." Underscore added 1972 Legislature.

§ 6402. Independent nominees

"This chapter does not prohibit the independent nomination of candidates under the provisions of Chapter 3 (commencing at Section 6800) of this division, subject to the following limitations:

(a) A candidate whose name has been on the ballot as a candidate of a party at the direct primary and who has been defeated for that party nomination is ineligible for nomination as an independent candidate. He is also ineligible as a

candidate named by a party central committee to fill a vacancy on the ballot for a general election.

(b) No person may file nomination papers for a party nomination and an independent nomination for the same office, or for more than one office at the same election."

§ 6611. Unsuccessful candidate; ineligibility as candidate of another party

"A candidate who fails to receive the highest number of votes for the nomination of the political party with which he was registered as affiliated on the date his declaration of candidacy or declaration of acceptance of nomination was filed with the county clerk cannot be the candidate of any other political party."

Appendix E

California Elections Code Provisions—Independent Nomination Procedure—Including Those Relating to Party Integrity

§ 6800. Scope of chapter

"A candidate for any public office, including that of presidential elector, for which no nonpartisan candidate has been nominated or elected at any primary election, may be nominated subsequent to or in lieu of a primary election pursuant to this chapter."

§ 6801. Defeated partisan candidates

"A candidate for whom a nomination paper has been filed as a partisan candidate at a primary election, and who is defeated for his party nomination at the primary election, is ineligible for nomination as an independent candidate."

§ 6803. Group of candidates for presidential electors; designation of presidential and vice presidential candidates

"Whenever a group of candidates for presidential electors, equal in number to the number of presidential electors to which this State is entitled, files a nomination paper with the Secretary of State pursuant to this chapter, the nomination paper may contain the name of the candidate for President of the United States and the name of the candidate for Vice President of the United States for whom all of those candidates for presidential electors pledge themselves to vote."

§ 6804. Printing of names on ballot

"When a group of candidates for presidential electors designates the presidential and vice presidential candidates for whom all of the group pledge themselves to vote, the names of the presidential candidate and vice presidential

candidate designated by that group shall be printed on the ballot pursuant to Article 1 (commencing at Section 10200) of Chapter 2 of Division 7."

§ 6830. Contents

"Each candidate or group of candidates shall file a nomination paper which shall contain:

(a) The name and residence address of each candidate, including the name of the county in which he resides.

(b) A designation of the office for which the candidate or group seeks nomination.

(c) A statement that the candidate and each signer of his nomination paper did not vote at the immediately preceding primary election at which a candidate was nominated for the office mentioned in the nomination paper. The statement required in this subdivision shall be omitted when no candidate was nominated for the office at the preceding primary election.

(d) A statement that the candidate is not, and was not at any time during the one year preceding the immediately preceding primary election at which a candidate was nominated for the office mentioned in the nomination paper, registered as affiliated with a political party qualified under the provisions of Section 6430. The statement required by this subdivision shall be omitted when no primary election was held to nominate candidates for the office to which the independent nomination paper is directed."

§ 6831. Signatures required

"Nomination papers shall be signed by voters of the area for which the candidate is to be nominated, not less in number than 5 percent nor more than 6 percent of the entire vote cast in the area at the preceding general election. Nomination papers for Representative in Congress, State Senator or Assemblyman, to be voted for at a special elec-

tion to fill a vacancy, shall be signed by voters in the district not less in number than 500 or 1 percent of the entire vote cast in the area at the preceding general election, whichever is less, nor more than 1,000."

§ 6833. Time for filing, circulation and signing; verification

"Nomination papers required to be filed with the Secretary of State or with the county clerk shall be filed not more than 79 nor less than 54 days before the day of the election, but shall be prepared, circulated, signed, verified and left with the county clerk for examination, or for examination and filing, no earlier than 84 days before the election and no later than 5 p.m. 60 days before the election. If the total number of signatures submitted to a county clerk for an office entirely within that county does not equal the number of signatures needed to qualify the candidate, the county clerk shall declare the petition void and is not required to verify the signatures. If the district falls within two or more counties, the county clerk shall within two working days report in writing to the Secretary of State the total number of signatures filed. If the Secretary of State finds that the total number of signatures filed in the district or state is less than the minimum number required to qualify the candidate he shall within one working day notify in writing the counties involved that they need not verify the signatures."

Appendix F

California Elections Code—Severability Provision

§ 48. Partial invalidity

"If any provision of this code or the application thereof to any person or circumstances is held invalid, the remainder of the code and the application of such provision to other persons or circumstances shall not be affected thereby."